Ohio to restore to their August 1, 1954, level the in trastate rates on bituminous coal transported by ra from eastern Ohio mines to destinations at Clevelan and other points in northeastern Ohio. *Intrastat Rates on Bituminous Coal Within Ohio,* 298 I. C. C 85 (March 5, 1956).

Background and Nature of the Case. For many years prior to August 1, 1932, the intrastate rates o coal from the mining districts in eastern Ohio to des tinations in northeastern Ohio were integrated b fixed differentials with the interstate rates from min ing districts in Pennsylvania and West Virginia to th same destinations (298 I. C. C. at 86). These differ entials were disrupted by the reductions in the intra state rates as authorized by the Ohio Public Utilities Commission effective August 1, 1932 (*ibid.*). The Interstate Commerce Commission, upon complaint filed by the railroads[1] challenging the lawfulness of the reduced intrastate rates, found that the reductions resulted in undue preference of Ohio shippers and localities and undue prejudice to interstate shippers and localities, and in unjust discrimination against interstate commerce, in violation of section 13 (4) of the Interstate Commerce Act (49 U. S. C. 13 (4)). *Intrastate Rates on Bituminous Coal Within Ohio,* 192 I. C. C. 413 (May 2, 1933). The I. C. C. ordered the carriers to remove such preference, prejudice, and discrimination by establishing and maintaining intra state rates at a level not lower than the rates in effect

[1] All of the principal railroads operating in Ohio joined in the complaint except the Wheeling & Lake Erie, which is now a part of the Nickel Plate.

prior to August 1, 1932 (192 I. C. C. at 452). The I. C. C.'s order was sustained by a three-judge district court upon the ground that the reduced rates were preferential of intrastate shippers and localities, and prejudicial to interstate shippers and localities. In view of the finding, the district court did not pass upon the issue of discrimination against interstate commerce. *State of Ohio* v. *United States,* 6 F. Supp. 386 (S. D. Ohio). The district court's decision was affirmed by this Court in *Ohio* v. *United States,* 292 U. S. 498. On February 16, 1934, the prior rates were reestablished (298 I. C. C. at 86).

Thereafter, several general increases in the prior rates, both interstate and intrastate, were authorized by the I. C. C.[2] Although the increases were substantial, the differentials remained very nearly the same between the various mines to the Cleveland area (298 I. C. C. at 86). The increases thus authorized by the I. C. C. were approved for intrastate application by the Ohio Public Utilities Commission, including the approval on May 7, 1953, of the Ex Parte 175 increase of twelve percent, maximum 40 cents per ton, and the increases in the intrastate rates became the same as the increases in the interstate rates. The action of the Ohio Commission in approving intrastate the Ex Parte 175 increase was upheld by the Supreme Court of Ohio on March 17, 1954. *Toledo Edison Co.*

[2] See Ex Parte No. 162, *Increased Railway Rates, Fares and Charges, 1946*, 266 I. C. C. 537; Ex Parte No. 166, *Increased Freight Rates, 1947*, 270 I. C. C. 403; Ex Parte No. 168, *Increased Freight Rates, 1948*, 276 I. C. C. 9; Ex Parte No. 175, *Increased Freight Rates, 1951*, 280 I. C. C. 179, 281 I. C. C. 557, 284 I. C. C. 589.

v. *Public Utilities Commission of Ohio,* 161 Ohio St. 221.

Early in 1954, appellant Cleveland Electric Illuminating Company, a large consumer of bituminous coal used in connection with the production of electricity in the territory adjacent to Cleveland, Ohio, began negotiations with the railroads for a reduction in the intrastate rates on coal. The principal argument advanced by the Illuminating Company in support of a rate reduction was that this was necessary to prevent a substantial diversion of the coal traffic to motor carriers. 298 I. C. C. at 88.

Prior to 1950, the Illuminating Company had received all of its coal requirements by rail. In that year, however, it began using trucks to transport small amounts of coal. By the year 1954, the Illuminating Company was trucking a rather substantial amount of coal from some of the mining districts nearest to the Cleveland area. As a result of the negotiations between the Illuminating Company and the railroads, the latter on April 23, 1954, proposed a reduction of 31 cents in the rail coal rates from Raymilton, Pa., to Ceico, Ohio (a distance of about 82 miles). A short time later, a similar reduction was proposed in the rail rates from Raymilton to the Illuminating Company's plant at Willoughby (Eastlake). Accordingly, the rates to both of these destinations became $2.36 per ton instead of $2.67. 298 I. C. C. at 87–88.

Thereafter, in April and May 1954, the principal railroads decided to reduce the rates on fine coal by 44 cents per ton from the Ohio No. 8, Middle, Lee-

tonia, Cambridge, and Crooksville districts in Ohio, the Moundsville and Fairmont districts in West Virginia, and the Pittsburgh, Connellsville, and Freeport districts in Pennsylvania, to Cleveland, Lorain, Avon Lake, and Willoughby (Eastlake), including intermediate points. 298 I. C. C. at 88; Tr. 3614–3615.

Immediately after the publication of these reduced rates, the railroads received numerous requests for reductions from other origins and to other destinations (298 I. C. C. at 88; Tr. 3617). Thereupon, the railroads concluded that the matter should be given further consideration before the reduced rates became effective, and asked both the federal and the state commissions to postpone the effective date from August 2 to September 2, 1954. Authority to postpone was granted by the I. C. C. as to the interstate rates. The Ohio Commission at first granted the postponement of the intrastate rates, but later rescinded its action. Thus the 44-cent reduction on the Ohio intrastate coal rates here involved became effective on August 2, 1954, and have since been maintained. The proposed reductions in the interstate coal rates were further postponed from time to time, over the protests of various interstate shippers (Tr. 3620–3621), and, subsequent to the I. C. C.'s decision here involved, were canceled. As soon as the Ohio intrastate rate reductions went into effect, the Nickel Plate refused to increase its rates voluntarily. The other carriers were accordingly compelled for competitive reasons to adopt the same rates on intrastate shipments of coal (298 I. C. C. at 88–89).

Proceeding before the Interstate Commerce Commission. On September 7, 1954, all the railroads involved, except the Nickel Plate, filed a petition with the I. C. C. alleging that the reduced intrastate rates resulted in a violation of the I. C. C.'s order of May 2, 1933, in *Intrastate Rates on Bituminous Coal Within Ohio, supra,* and sought enforcement of that order or such other relief as might be warranted. In response, the I. C. C. reopened the 1933 case to determine whether the intrastate rates contravened (a) the requirements of the 1933 order, and (b) the provisions of section 13 (3) and (4) of the Act (298 I. C. C. at 89).[3] After extensive hearings, the I. C. C. on March 5, 1956, issued its decision and order, finding: (a) that the reduced intrastate rates do not contravene the requirements of the 1933 order; and (b) that these rates are, and for the future will be, unduly preferential of Ohio shippers and localities and unduly prejudicial to interstate shippers and localities from origin districts in Pennsylvania and West Virginia, and that such rates are causing unjust discrimination against interstate commerce. The order implementing the findings required that the intrastate rates in effect on August 1, 1954, be re-established.

Following denial of petitions for reconsideration,

[3] Section 13 provides in applicable part as follows:

(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to

the appellants brought the present suit to set aside the I. C. C.'s order. In dismissing appellants' complaint, the court below upheld the I. C. C.'s determination that the reduced intrastate rates in issue have caused undue preference and prejudice between persons and localities in intrastate and interstate commerce. Accordingly, as in the prior litigation involving the same rate structure (*State of Ohio* v. *United States*, 6 F. Supp. 386, affirmed, 292 U. S. 498), the court found it unnecessary to consider the I. C. C.'s additional determination that the reduced intrastate rates in issue constitute a revenue discrimination against interstate commerce.

ARGUMENT

1. Appellants' principal contention is that the I. C. C., in directing the re-establishment of the Ohio

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hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. * * *

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

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intrastate rates which had been in effect on August 1, 1954, failed to give adequate consideration to the impact of truck competition. Specifically they contend that the Commission erred in not concluding that truck competition was "a differentiating factor" (Juris. St. 12) which justified the reduced intrastate rates. According to appellants, the intrastate rail carriers should not be left "defenseless against truck competition" (Juris. St. 18).

It is at least doubtful whether the appellants—consumers and consignees of coal—have standing to make this contention. However commendable may be their solicitude for the welfare of the railroads, appellants occupy the anomalous position of customers who complain of the effects *on the railroads* (who instituted the proceeding) of the possible diversion of the customers' business to motor carriers because of claimed substantial economies. Compare *Sprunt* v. *United States,* 281 U. S. 249; *United States* v. *Merchants Etc. Ass'n,* 242 U. S. 178. In any event, even assuming *arguendo* that appellants have the requisite standing, it is certainly significant that none of the railroads which would be affected by the truck competition has undertaken to attack the I. C. C.'s order. The reason for the railroads' failure to attack the order is apparent from a consideration of the I. C. C.'s findings.

The Commission concluded that, "On this record, we are not convinced that an increase in the intrastate rates to their former level would cause a diversion of traffic to the trucks to such an extent that the [railroads] would suffer a greater loss in revenue

than would result from maintenance of the present rates." In support of this conclusion, the Commission found: "There is no truck competition from the interstate districts or the Ohio No. 8, Cambridge, and Crooksville districts to the Cleveland area. There is some truck competition from the Middle and Leetonia districts, but it is indicated that it is not of sufficient severity to warrant different treatment of the rates from those districts and the rates from the other districts." 298 I. C. C. at 109.

These findings are pertinent to determining whether it would be feasible for the Illuminating Company to divert, from rail to truck, coal purchases of 1,000,000 tons annually, as it had threatened to do. The Commission rejected various estimates offered by the Illuminating Company as to the cost of transporting coal by truck, because some involved a juggling of the cost of coal with the cost of transportation, while others contained no allowance for profit. The Commission found that the most significant of the cost studies produced a rate of $3.12 per ton from mines in Ohio No. 8 district, as compared with the prior rail rate of $3.07 which the Commission ordered restored (298 I. C. C. at 97–98). Indeed, neither here nor in the court below was it seriously contended that it is feasible to transport coal by truck from Ohio No. 8 district to the Cleveland area.

The factor of truck competition was thus limited to a consideration of the extent to which the Illuminating Company could obtain its coal requirements from the Middle and Leetonia districts, which are nearer to Cleveland than is Ohio No. 8 district.

Plaintiff's Exhibit 510 shows that in 1953, out of 3,304,000 tons of steam coal shipped to Cleveland, 1,734,000 tons, or more than half, came from Ohio No. 8 district, 463,000 tons from the Fairmont district in West Virginia, 350,000 tons from the Middle and Leetonia districts in Ohio, and 129,000 tons from the Moundsville district in West Virginia. Since it is undisputed that there is no truck competition from the interstate districts or from Ohio No. 8 district, and since the most recent available figures showed that the Middle and Leetonia districts furnished little more than ten per cent of the steam coal shipped to Cleveland, the Commission's conclusion as to motor carrier competition clearly was supported by substantial evidence.[4]

The Commission was therefore free to conclude that the reduced intrastate rates, by destroying the long-standing system of differential rates, would exclude western Pennsylvania and northern West Virginia coal producers from the northeastern Ohio market, and that such rate reduction would probably spread, with consequent additional revenue loss to the carriers. Under these circumstances, we submit that the Commission was warranted in requiring re-establishment of the system of differential rates previously sustained by this Court, under which consumers in northeastern Ohio have access to many sources of supply in Ohio, Pennsylvania, and West

[4] Appellants' contention (Juris. St. 18) that the Commission disregarded *potential* truck competition is, as the court below pointed out (Juris. St. Appendix A p. 13), merely based on a play on words.

Virginia, and under which producers in these areas are able to compete for the northeastern Ohio market.

2. Appellants also contend that the Commission erroneously held that it had no power to require a reduction in the interstate rates in order to correct undue preference and prejudice between intrastate and interstate persons and localities (Juris. St. 19). But the Commission made no such holding. Instead, its actual holding simply was that the instant case did not present the issue. The Commission stated (298 I. C. C. at 106–107):

> We agree that the relationship between State and interstate rates is a primary consideration here, but we do not agree that, *under the issues in this reopened proceeding,* we may order a reduction in the interstate rates. Whether or not in a section 13 (3) proceeding where the issue as to the interstate rates is squarely raised and tried, maximum interstate rates may be prescribed by us under the powers conferred upon this Commission in that section of the act, *need not here be determined.* At the further hearing herein, the examiner plainly stated, in response to inquiries from counsel, that in his opinion the interstate rates as such were not in issue. The record shows that prior to August 2, 1954, the differentials between the various producing districts, interstate and intrastate, had been in effect generally, with only slight changes or modifications, for more than 30 years, and that some of the interstate shippers are suffering a severe disadvantage in attempting to compete in the Cleveland area under the present adjustment, but they made no attempt to show that the

> interstate rates exceed a maximum reasonable level. (Emphasis added.)

Thus, since the reasonableness of the interstate rates was not presented under the pleadings and proof in the case, the Commission properly refrained from determining that question, and there was no occasion to determine the Commission's powers over interstate rates in a Section 13 (3) proceeding.[5]

3. Appellants' remaining contention (Juris. St. 23) is that by its order the Commission has preserved a differential system of intrastate and interstate rates on coal moving to northeastern Ohio which is in conflict with this Court's decision in *United States* v. *Illinois Central,* 263 U. S. 515, 524, holding that a "* * * difference in rates cannot be held illegal [because unduly preferential and prejudicial] unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions." This contention finds its answer in *Ohio* v. *United States,* 292 U. S. 498, sustaining the same rate structure as the instant case. See also *Ayrshire Collieries* v. *United States,* 335 U. S. 573, 590–593.

In the district court, appellants relied upon evidence that in 1953 Ohio intrastate shipments of coal to the Illuminating Company moved an average distance of 131.8 miles and with an average revenue (at the reduced rates) of $2.61 per ton, as compared with

[5] Furthermore, the Ohio Public Utilities Commission, and the Ohio Supreme Court in 1954, had ruled that the intrastate rates, as they existed before the rate reduction which occasioned the present suit, were just and reasonable (*supra*, p. 3).

an average haul of 125.6 miles and an average revenue of $2.52 per ton on all interstate movements of coal to and from Ohio. As the court below pointed out (Juris. St., Appendix A, p. 11):

> This is not an apt comparison. There is no relevant relation between rates on intrastate shipments to the Illuminating Company and rates on a heterogeneous combination of shipments into and out of Ohio from various points of origin to diverse destinations. We are concerned here with the relation between intrastate and interstate rates to a common destination area. It is obvious that if the average distance of intrastate movements of coal to the Illuminating Company was 131.8 miles, the average distance of the interstate shipments to that company's plants from the more remote interstate districts would be greater and that the average revenue on such longer hauls at higher interstate rates would be in excess of the average revenue on the shorter haul of 131.8 miles.

Appellants further argue that, on traffic of the Illuminating Company moving to the involved destinations from intrastate and interstate origins, the ratio of revenue received by the rail carriers to their out-of-pocket cost was greater for the intrastate traffic than for the interstate traffic (Juris. St. 25). "But even if this were true," the court below correctly held (Juris. St., Appendix A, p. 12), "it would not demonstrate that the intrastate rates were relatively higher. It is an axiom of rate-making that the longer haul yields a lower per ton mile return. *Ohio* v. *United States*, 292 U. S. [498]." Moreover, this

aspect of the case is governed by this Court's holding in *Ayrshire Collieries* v. *United States, supra,* at 590–593, that, since the Commission may consider competition in addition to the factors of distance and transportation conditions, a rate structure such as that involved in this case is not invalidated by the fact that in some instances the rate (not merely, as here, the revenue produced by a rate) is greater for some shorter hauls than for longer hauls.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is correct and that this appeal presents no substantial questions. The judgment of the district court should be affirmed.

J. LEE RANKIN,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
SAMUEL R. HOWELL,
Associate General Counsel,
Interstate Commerce Commission.

MAY 1957.

FILED
MAY 22 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 927

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, THE NORTH AMERICAN COAL CORPORATION, AND OHIO COAL ASSOCIATION, *Appellants*,

VS.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*, AND THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Intervenors-Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

MOTION OF THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., INTERVENORS-APPELLEES, TO AFFIRM

ANDREW C. ARMSTRONG,
HOWARD F. BURNS,
DWIGHT B. BUSS,
R. B. CLAYTOR,
HUGH B. COX
ANTHONY P. DONADIO,
JOHN P. FISHWICK,
JOHN W. HANIFIN,
RICHARD J. MURPHY,
M. C. SMITH, JR.,
W. A. WILKINSON,

EDWARD A. KAIER,
1138 Transportation Center,
Six Penn Center Plaza,
Philadelphia 4, Penna.,
Attorneys for
Intervenors-Appellees.

Date: May 22, 1957.

INDEX

Table of Contents

	PAGE
Statement of the Case	2
Argument	5
I. Appellants Seek a Re-review of the Evidence	6
Appellants' Question No. I	7
Appellants' Question No. II	10
II. The Alleged Errors of Law Are Without Substance	11
Appellants' Question No. III	12
Appellants' Question No. IV	14
Conclusion	18
Appendix A	19

Table of Cases Cited

Ayrshire Corp. v. United States, 335 U. S. 573	15
Board of Railroad Commrs., S. Dak. v. Chicago, B. & Q. R. Co., 173 I.C.C. 773	15
Cleveland Electric Illuminating Co., et al. v. United States, et al., 147 F. Supp. 622	5
In the Matter of Increases in Freight Rates and Charges Within the State of Ohio, Formal Case No. 23104, Ohio Public Utilities Commission	15
Intrastate Rates on Bituminous Coal Within Ohio, 192 I.C.C. 413; 298 I.C.C. 85	2, 3
Mississippi Public Service Commission v. United States, 349 U. S. 908	11
Ohio v. United States, 292 U. S. 498	3, 5, 9, 16, 17

PAGE

Toledo Edison Co. v. Public Utilities Commission, 161 Ohio St. 221, 118 N. E. (2d) 531 16
United States v. Illinois Cent. R.R., 263 U. S. 515 ..... 14, 16
Universal Camera Corp. v. Labor Bd., 340 U. S. 474 6
West Kentucky Coal Bureau v. Illinois Central R. Co., 194 I.C.C. 91 15
Youngstown Co. v. United States, 295 U. S. 476 16

Table of Statutes Cited

28 U. S. C., sections 2321-2325 2
49 U. S. C., Section 3(1) 16
49 U. S. C., section 13(3)(4) 2
49 U. S. C., section 17(9) 2

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Intervenors-Appellees,[1] pursuant to Rule 16, paragraph 1(c) of the Revised Rules of the Supreme Court, move that

[1] The Intervenors-Appellees include The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Erie Railroad Company, The Monongahela Railway Company, Montour Railroad Company, New York Central Railroad Company, Norfolk and Western Railway Company, The Pennsylvania Railroad Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh & West Virginia Railway Company, The Virginian Railway Company, Western Allegheny Railroad Company, and Western Maryland Railway Company.

the judgment of the United States District Court for the Northern District of Ohio, Eastern Division, be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

This is a direct appeal from a judgment of a statutory three-judge District Court entered on December 27, 1956, pursuant to U. S. Code, Title 49, sec. 17(9) and Title 28, secs. 2321-2325, which dismissed a complaint seeking to set aside an order of the Interstate Commerce Commission, entered pursuant to section 13(3)(4) of the Interstate Commerce Act (U. S. Code, Title 49, sec. 13(3)(4)) in a proceeding entitled *Intrastate Rates on Bituminous Coal Within Ohio,* 298 I.C.C. 85.

The facts as shown by the report of the Interstate Commerce Commission and as found by the District Court may be briefly summarized as follows:

For many years prior to 1932, the rates on bituminous coal from mining districts in Ohio to destinations in the northeastern part of that state were related by fixed differentials to the rates to the same destinations from mining districts in Pennsylvania and West Virginia. In that year, the Ohio Public Utilities Commission reduced various intrastate rates to northeastern Ohio. On petition of the principal railroads, the Interstate Commerce Commission found that the reduced rates resulted in undue preference of Ohio shippers and localities and undue prejudice to shippers and localities in interstate commerce and in unjust discrimination against interstate commerce in violation of section 13(4) of the Act. The Commission, therefore, ordered the restoration of the intrastate rates to their earlier level.

Intrastate Rates on Bituminous Coal Within Ohio, 192 I.C.C. 413. That action of the Commission was ultimately sustained by this Court in *Ohio v. United States*, 292 U. S. 498. Thereafter, through the various general increases in interstate rates which were authorized by the Interstate Commerce Commission in Ex Parte Nos. 115, 162, 166, 168 and 175, the Ohio Public Utilities Commission authorized the same general increases so that the differentials which had been in existence before 1932, and which had been restored in the earlier proceeding, remained unaltered to any substantial extent until August 1, 1954.

The change in this situation in 1954 came about in the following manner. After having failed in protracted litigation concerning the reasonableness of the intrastate rates, both before the Ohio Public Utilities Commission and the Supreme Court of Ohio (Jur. St., App. B, p. 87), appellant, The Cleveland Electric Illuminating Company, a large consumer of bituminous coal, began negotiations with the railroads for a reduction in those rates on the basis of truck competition. The Illuminating Company had begun to experiment with truck transportation of coal in 1950 and by 1953, it was trucking a substantial volume between points not involved in this proceeding, and it threatened to move much more by truck. It gave the railroads certain figures purporting to show the cost of transportation by truck (which data, as will be later indicated, was completely discredited in the proceedings before the Interstate Commerce Commission). In May 1954, therefore, the railroads decided to meet the threatened truck competition by a reduction of 44 cents per ton in the rates to northeastern Ohio from certain Ohio points and, to maintain rate relationships, from certain points in Pennsylvania and West Virginia. The intrastate rates which the railroads decided to reduce had been found reasonable in 1953 both by the Ohio Public

Utilities Commission and the Supreme Court of Ohio. Tariffs embodying the reduced rates were filed with the Interstate Commerce Commission and with the Ohio Public Utilities Commission to become effective on August 2, 1954. (Jur. St., App. A, pp. 7-8.)

The publication of the proposed 44-cent reduction in rates resulted in a large number of requests to the railroads for reductions in rates by shippers and consumers in other origin districts and at other destinations. As a result, the railroads concluded that further study should be made before the reduced rates became effective and applied to the respective commissions for permission to postpone the effective date of the reductions in both the interstate and intrastate rates. The Interstate Commerce Commission granted the request. The Ohio Public Utilities Commission, however, refused the request for postponement of the intrastate rate reduction and it became effective on August 2, 1954.

Shortly after August 2, 1954, all the railroads, except the Nickel Plate, filed a petition with the Interstate Commerce Commission claiming that the reduced intrastate rates violated the order of the Commission entered in the 1932 proceedings, and sought either enforcement of that order or such other relief as might be warranted. The Commission thereupon reopened the 1932 proceeding to determine whether its earlier order was being violated and whether the intrastate rate reduction contravened the provisions of section 13(3)(4) of the Act. After extensive hearings, the Commission found that its earlier order was not violated, but that the reduced Ohio intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial to localities and shippers in origin districts in Pennsylvania and West Virginia, and that the rates caused

unjust discrimination against interstate commerce. Its order required that the rates in effect on August 1, 1954, be reestablished. 298 I.C.C. 109-10. Petitions for reargument and further consideration were denied on June 26, 1956.

Although the Nickel Plate Railroad joined with the present appellants in defending the 44-cent reduction before the Interstate Commerce Commission and in resisting the increase in rates sought by the other railroads and ultimately granted by the Commission's order, that order has now been fully complied with, the increased rates required thereby are in effect and the Nickel Plate Railroad did not join in the suit to set aside the Commission's order.

The District Court, in dismissing the petition for review filed by appellants herein, did not find it necessary to pass upon both aspects of the Commission's order. Insofar as the Commission found that the intrastate rates in issue "... are, and for the future will be, unduly preferential of Ohio shippers and localities and unduly prejudicial to interstate localities and shippers ...", the District Court held that the Commission's findings were adequate to support its order, and that the findings were, in turn, supported by substantial evidence. But, as in the 1932 proceeding (see *Ohio v. United States*, 292 U. S. 498), the Court found it unnecessary to pass on the issues raised as to unjust discrimination against interstate commerce. *Cleveland Electric Illuminating Co., et al. v. United States, et al.*, 147 F. Supp. 622.

ARGUMENT

The decision of the District Court does not present any question of substance warranting further argument in this Court. Appellants seek to have this Court review and redetermine a number of issues of fact by a detailed re-

view of a voluminous record. This has already been done by the District Court in an opinion prepared with obvious care and with full attention to the same factual issues now presented here again, and with full appreciation of the standards of review laid down by this Court. Affirmance of the decision below will be fully consistent with the prior decisions of this Court.

I.

Appellants Seek A Re-review of the Evidence

The Statement As To Jurisdiction filed by appellants shows that they either ignore or misunderstand the respective functions of the District Court and this Court in the review of orders such as that of the Commission in this case. In *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, this Court made it clear that when a lower court charged with review of an administrative order has applied the proper standards of review, this Court does not re-examine the record to determine whether the lower court was correct. At pages 490-1 of its opinion in that case, this Court stated:

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

Appellants, significantly, do not assert that the District Court in this case misapprehended its proper role, and examination of the questions raised by appellants will demonstrate that such questions are not substantial and that the District Court plainly understood and properly exercised its powers of review.

APPELLANTS' QUESTION NO. I

"I. Whether that finding of the Commission with respect to truck competition is supported by essential findings based on substantial evidence."

The question whether the Commission's findings on the issue of truck competition are adequately supported by subsidiary findings and based on substantial evidence was thoroughly considered by the District Court. After such consideration, that Court correctly concluded:

> "It would serve no purpose to review at length the evidence on this issue, which is set out with great particularity in the Commission's report. All pertinent facts, both favorable and unfavorable to the position of plaintiffs, were considered by the Commission.
>
> "The actual trucking of coal to the Illuminating Company plants from Raymilton, Pennsylvania and from the Middle and Leetonia districts in Ohio was done by producers who supplied the coal. It was the Commission's view that the trucking rates charged by the producers were not reliable indicators of fair rates for that mode of transportation. In the two instances where the trucking rates from Raymilton were reduced ten cents a ton by the producers, these reductions were offset by contemporaneous increases in like amounts in the price of the coal, with the result that the total delivered price to the Illuminating Company remained unchanged. The average rate of trucking from the Middle and Leetonia districts was said to be $2.80 per ton, which is the same as the prior rail rate from the same districts. It was shown that if the Illuminating Company embarked upon a program of trucking upwards of a million tons of coal from the Middle and Leetonia districts and from Raymilton, this would require the company either to purchase the necessary equipment and do the hauling itself, or to engage a competent trucking company for that purpose. In this connection the Illuminating Company submitted four studies of the cost of such large scale trucking. Two of

these studies were prepared by companies that had no experience in trucking and they contain no items for profit. The third study, which was merely a comparison of the cost of trucking coal with an estimate of the cost of hauling iron and steel, was likewise deficient in its omission of any consideration of profit. The fourth study contemplated the use of a light-weight tractor and an aluminum trailer which, the Commission observed, had never been tested and 'so far as appears it is merely in the blueprint stage.' Evidence of many other factors bearing upon this issue were also referred to in the Commission's report. These included a survey of the Nickel Plate Railroad showing the amount of trucking to the Cleveland area in the first eleven months of 1954; the increased use of trucks for the delivery of coal to the cities of Akron, Canton and Massillon from the nearby mines in the Middle and Leetonia districts; the large general increase in the use of trucks for transporting coal in Ohio, and the absence of such an increase in trucking to the Cleveland area. There was evidence also of a substantial increase in the tonnage of coal transported by rail to the Cleveland area in recent years" (147 F. Supp. 622, 629-30).

In an effort to create the impression that the Commission's conclusion on the issue of truck competition is contrary to the evidence, the appellants, at pages 14-17 of their Statement As To Jurisdiction, summarize some of the evidence more favorable to their contentions. This partial summarization of evidence, on the basis of which the appellants contend that the only possible conclusion is that reached by the Examiner, is nothing more than an attempt to have this Court substitute its judgment for that of the Commission.[2] When confronted with a similar effort by the

[2] In view of the partial summarization of the truck competition evidence included in appellants' Statement As To Jurisdiction, there is attached to this Motion, as Appendix A, a more complete summary of the evidence on this issue contained in the record before the Interstate Commerce Commission.

appellants, the District Court again properly concluded that:

> "It may be that on the basis of the evidence, reasonable minds might disagree as to the extent of the probable future truck competition from the Middle and Leetonia districts. However, it is the function of the Commission to weigh the evidence and draw the inferences therefrom. This court cannot substitute its judgment or the judgment of the examiner for that of the Commission. In determining the issue of truck competition, as well as all other factors involved in rate-making, the Commission is peculiarly qualified by training and experience to form sound judgments. Under our limited jurisdiction it is not for us to say whether we would have reached the same conclusion on the same evidence or whether we disagree with the reasoning of the Commission or the wisdom of its determination. It is enough that the Commission's finding on the issue of actual and potential truck competition, which necessarily rests upon a compound of fact and prophecy, is supported by substantial evidence and a fair and informed forecast of future probabilities" (147 F. Supp. 622, 630).

This conclusion of the District Court is in full accord with the opinion of this Court in the suit to set aside the Commission's order of May 2, 1933 in this case. In that opinion, Justice Roberts stated:

> ". . . In effect, we are asked to reexamine the evidence, appraise it, and hold the Commission erred in its judgment as to the facts. We have often said that we have no such power." *Ohio v. United States,* 292 U.S. 498, 506 (1934).

APPELLANTS' QUESTION NO. II

"II. Whether the Commission, in making that finding with respect to truck competition, could rationally give consideration only to existing and past truck competition and could disregard or treat as legally irrelevant evidence as to imminent large scale diversions to truck service if the intrastate rates were not reduced."

Appellants attempt, in raising this question, to construe one word in the Commission's findings as proof that it disregarded "imminent large scale diversions to truck service." The Commission, after finding no truck competition from three of the five Ohio origin districts (a finding not seriously challenged), found (298 I.C.C. 109):

> ". . . There is some truck competition from the Middle and Leetonia districts, but it is indicated that it is not of sufficient severity to warrant different treatment of the rates from those districts and the rates from the other districts."

Appellants argue, solely on the basis of the use by the Commission of the word "is" in this sentence, that the Commission limited its consideration to "existing and past truck competition" (Jur. St., p. 18). The word "is" — the present tense — in speaking of a concept such as competition, certainly does not require such a narrow meaning,[3] and is equally susceptible of the interpretation given it by the District Court (Jur. St., App. A, p. 13) — that the Commission "meant potential as well as actual truck competition". But were there doubt as to the Commission's meaning, it is completely dispelled by a reading of the Commission's report as a whole. It gave full consideration to appellants' claim

[3] Indeed, as appellants purport to read the sentence, the word "is" would refer only to the present competition, excluding even past competition, yet they themselves read the word as including both "present" and "past" competition (Jur. St. p. 3).

that restoration of the prior intrastate rates would make it feasible, from a cost standpoint, to truck a million tons of coal a year from the two origin districts in question. See 298 I.C.C. 96, 102. And in its ultimate finding on this issue the Commission stated (298 I.C.C. 109):

> "On this record, we are not convinced that an increase in the intrastate rates to their former level would cause a diversion of traffic to the trucks to such an extent that the respondents would suffer a greater loss in revenue than would result from maintenance of the present rates."

Certainly no one can seriously contend that the phrase "would cause a diversion of traffic to the trucks" refers only to existing and past truck competition, and not to potential truck competition.

In sum, appellants' first two questions present no more than the basic issues of fact finding and judgment which were originally presented to and resolved by the Commission, and which, as thus resolved, have been carefully reviewed and approved by the District Court. They do not warrant further briefs and argument in this Court. *Mississippi Public Service Commission v. United States*, 349 U. S. 908.

II.

The Alleged Errors of Law Are Without Substance

In addition to appellants' request that the Court reevaluate the record in this case to determine whether the District Court has "grossly misapplied" the standard under which it reviews orders of the Commission, appellants' Statement As To Jurisdiction, by questions III and IV, requests correction by this Court of two alleged errors of law by the District Court. The questions are without substance.

APPELLANTS' QUESTION NO. III

"*III. Whether, if the previously existing differences between the intrastate and interstate rates must be restored under a finding of preference and prejudice, the Commission has power to order a reduction in the interstate rates, or whether, under section 13(4) of the Interstate Commerce Act, the Commission's power is limited to ordering an increase in the intrastate rates.*"

In raising this question on appeal, the appellants seek a determination by this Court of an issue which has never required decision in the entire course of these proceedings. The question is, therefore, entirely collateral to the present case.

In its order reopening these proceedings, the Interstate Commerce Commission specifically limited the investigation to a determination whether the *intrastate rates* violated section 13(3)(4) of the Interstate Commerce Act. Thereafter, the evidence of all the parties was directed to the lawfulness of the *intrastate rates*, with the exception of certain evidence presented by the railroads to show that the then existing level of interstate rates was a reasonable one. After the closing of the record, the filing of briefs, exceptions and oral argument, the Commission concluded in its Finding 4 (298 I.C.C. 109) that undue preference of Ohio shippers and localities and undue prejudice to interstate shippers and localities resulted from the reduced level of the *intrastate rates*. In addition, the Commission found in Finding 2 (298 I.C.C. 109) that the interstate rates were reasonable and noted in its report the fact that in the course of the proceedings no party contended otherwise. From these facts, it is obvious that no issue of preference and prejudice resulting from the level of the interstate

rates ever arose in the proceedings. Moreover, contrary to the suggestion in appellants' Question No. III, the Commission did not hold, as a matter of law, that it was lacking in power under section 13(4) to order a reduction in interstate rates. The specific ruling of the Commission reads as follows:

> "We agree that the relationship between State and interstate rates is a primary consideration here, but we do not agree that, *under the issues in this reopened proceeding*, we may order a reduction in the interstate rates. Whether or not in a section 13(3) proceeding, where the issue as to the interstate rates is squarely raised and tried, maximum interstate rates may be prescribed by us under the powers conferred upon this Commission in that section of the act, *need not here be determined*. . . ." (Emphasis supplied.) (298 I.C.C. 106-7).

The Commission, in other words, recognized that in a proceeding where the lawfulness of only the intrastate rates had been brought in issue and where no one had contested the level of the interstate rates, the question of its power to reduce interstate rates under section 13(4) was immaterial.

The District Court agreed (Jur. St., App. A, p. 16) and pointed out the additional fact that, ". . . It is clear from a reading of the report that the Commission's refusal to reduce such [interstate] rates was also based upon grounds entirely unrelated to its presumed lack of power to do so . . ." There is simply no basis for appellants' claim that the legal question which the Commission did not decide, and which the District Court did not decide, should or could be decided by this Court.

APPELLANTS' QUESTION No. IV

"IV. Whether the Commission's findings disclose that the Commission has complied with the rule of this Court in United States v. Illinois Central, 263 U. S. 515, 524, that a difference in rates cannot be held to be illegal, because unduly preferential and prejudicial, unless it is shown that such difference 'is not justified by the cost of the respective services, by their values, or by other transportation conditions'."

In *United States v. Illinois Cent. R.R.*, 263 U. S. 515, the Court said at page 524:

> ". . . difference in rates cannot be held illegal [because unduly preferential and prejudicial], unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."

This rule, appellants assert, has been violated because the Commission, in appellants' opinion, ". . . abandons transportation standards and takes refuge in assumed competitive needs and historical relationships . . ." (Jur. St., p. 25).

Quite plainly, the Commission has done nothing of the sort. The statement in the report of the Commission to which appellants refer is as follows (298 I.C.C. 101):

> ". . . It is of course recognized that cost is only one of a number of important elements to be considered in determining the lawfulness of rates, and that rates on coal are not generally made on a mileage basis but are related to one another by group differentials which usually reflect competitive needs more than distances."

The statement is in full accord with the well-established principle of rate-making that in a group and differential rate relationship, rates from remote differential groups are, in their very nature, lower in level than the rates from nearer

districts. *Board of Railroad Commrs., S. Dak. v. Chicago, B. & Q. R. Co.*, 173 I.C.C. 773, 778; *West Kentucky Coal Bureau v. Illinois Central R. Co.*, 194 I.C.C. 91, 99; *Ayrshire Corp. v. United States*, 335 U. S. 573.

Even if it stood alone, this statement by the Commission could not possibly be construed as meaning that the Commission relied *only* on the competitive needs of shippers and historical rate relationships in fixing the intrastate rates. But it does not stand alone. The report of the Commission discloses many other transportation standards and conditions considered by the Commission in fixing the level of the intrastate rail rates. Among these are (1) the revenue needs of the respondent railroads, (2) the volume of present and prospective trucking to the Cleveland area and trucking cost evidence, (3) the volume of rail shipments to the Cleveland area, (4) the history of the rail rate adjustments both to the Cleveland area and other contiguous areas, (5) rail cost evidence submitted by the appellants even though it was found not to ". . . have the accuracy necessary for a fair approximation of the actual costs incurred from the various origin districts, as many assumptions had to be made . . ." (298 I.C.C. 101), (6) comparisons of both interstate and intrastate rates in the Cleveland and other adjustments, (7) comparative earnings under both intrastate and interstate rates, and (8) comparative railroad operating conditions in the intrastate and interstate rail service. An additional and most important fact considered by the Commission was the finding of the Ohio Public Utilities Commission that the higher level of intrastate rates was reasonable. *In the Matter of Increases in Freight Rates and Charges Within the State of Ohio, Formal Case No. 23104, Ohio Public Utilities Commission*, decided May 7, 1953, and affirmed by the

Supreme Court of Ohio in *Toledo Edison Co. v. Public Utilities Commission*, 161 Ohio St. 221, 118 N. E. (2d) 531.

It is thus clear that the Commission did not, as appellants contend, rely *solely* on "assumed competitive needs and historical relationships." It did, of course, place great emphasis on the incontestable fact that interstate shippers suffered great losses in business after the intrastate-interstate differentials were drastically increased on August 2, 1954. Moreover, the Commission properly considered the history of the rate adjustment as evidence of its reasonableness. As this Court said in *Youngstown Co. v. United States*, 295 U. S. 476, 480, "The existing rate structure furnished support for the finding of reasonableness." But by no means can it be said that these were the only transportation standards considered by the Commission.

Moreover, *United States v. Illinois Cent. R.R.*, *supra*, involved not section 13(4) of the Interstate Commerce Act but, rather, section 3(1) which deals with relationships between different interstate rates rather than relationships between interstate and intrastate rates. *Ohio v. United States*, 292 U. S. 498, is the leading decision of this Court on the question of the findings which the Commission must make to support an increase in intrastate rates to remove undue preference and prejudice as between persons and localities. At page 511 of that decision, this Court stated.

> "The Commission has found that the interstate rates from four districts of origin are reasonable. It has found that Ohio intrastate rates, the transportation conditions being similar, are, distance considered, out of relation to these interstate rates, so as to create undue preference and prejudice. These findings, supported by evidence, fully justified the order with re-

spect to the intrastate rates under section 13 of the Act. Compare *Louisiana Commission v. Texas & N. O. R. Co.*, 284 U.S. 125."

Here, the Commission has found (1) that the involved interstate rates are reasonable (Finding 3), (2) that the transportation conditions under which the involved interstate and intrastate transportation is performed are similar (Finding 2), (3) that the relationships between the interstate rates and the intrastate rates, as they existed before the 44-cent reduction in the intrastate rates, had been in effect for many years, that those state rates were approved by the Ohio Commission and, if restored, would not be unreasonable in relation to interstate rates (Finding 7), (4) that the reduced intrastate rates cause undue preference and prejudice as between persons and localities in intrastate and interstate commerce (Finding 4) and (5) that the increased intrastate rates will not exceed reasonable rates or charges (Finding 7) (298 I.C.C. 109-10). And these findings have been found to be based on adequate subsidiary findings and substantial evidence. Under *Ohio v. United States, supra*, nothing more is required.

CONCLUSION

For the foregoing reasons, we submit that the decision of the District Court is correct and this appeal presents no substantial question. The judgment of the District Court should accordingly be affirmed.

Respectfully submitted,

ANDREW C. ARMSTRONG,
HOWARD F. BURNS,
DWIGHT B. BUSS,
R. B. CLAYTOR,
HUGH B. COX
ANTHONY P. DONADIO,
JOHN P. FISHWICK,
JOHN W. HANIFIN,
RICHARD J. MURPHY,
M. C. SMITH, JR.,
W. A. WILKINSON,

EDWARD A. KAIER,
1138 Transportation Center,
Six Penn Center Plaza,
Philadelphia 4, Penna.,
Attorneys for
Intervenors-Appellees.

Date: May 22, 1957.

APPENDIX A

Summary of Evidence on the Issue of Truck Competition.[4]

1. In 1953, the rail shipments of bituminous coal to the four involved destinations, Cleveland, Lorain, Avon Lake and Willoughby, from Ohio districts totalled 3,453,532 tons and from interstate districts totalled 8,660,679 tons, or a total of rail shipments from all districts of 12,114,211 tons (Exhibit 429). In contrast, testimony of the protestants shows that in the first eleven months of 1954, only 310,445 tons of coal were trucked into the destination area involved in this case from all origins, of which only 230,360 tons were delivered to industries and others who had rail facilities for receiving coal (Tr. 4031). Members of the Ohio Coal Association had lost accounts in Cuyahoga County totalling only 175,000 tons annually (Tr. 4145). Of 4,876,641 tons of coal delivered from all origins to northeastern Ohio and allegedly diverted to trucks, only 268,335 tons were delivered to destinations accorded the intrastate rate reductions (Exhibit 487, Tr. 4950). The coal transported by truck to these thirteen involved destinations represented only 3.2 percent of the coal movement by rail from all origins (Tr. 4950).

2. Rail shipments of Ohio coal to Cleveland, Lorain, Avon Lake and Willoughby, Ohio increased 162 percent between 1932 and 1953, 106 percent between 1939 and 1953, and 51 percent between 1945 and 1953. In

[4] Figures in parentheses preceded by the letters "Tr." or the word "Exhibit" refer to the transcript of testimony and exhibits in the record before the Interstate Commerce Commission.

comparison, interstate rail shipments of coal to the same destinations increased 147 percent, 49 percent and 12 percent in the same respective periods (Exhibits 431, 432, 433).

3. There has been no trucking of coal from the important interstate districts of Fairmont, Moundsville, Pittsburgh, Connellsville and the southern crescent districts. The only evidence of trucking from the Butler-Mercer District and Raymilton, Pa. to destinations involved in these proceedings is the truck transportation by the Illuminating Company in 1953 from those points to Willoughby, Ohio (Exhibits 510, 517). Because the Pennsylvania truck weight limit is six tons less than the Ohio truck weight limit (Tr. 5113), the cost of trucking from the Pennsylvania origins will be greater than from the Ohio origins. The Raymilton mines could not satisfy even 25 percent of the needs of only one of the Illuminating Company's plants (Tr. 4737).

4. On page 102 (298 I.C.C. 102), the Commission concludes in considering the threat of trucking from the Ohio No. 8 District, by far the most important coal-mining district in Ohio, that:

> "Although the Illuminating Company indicates that it might truck some coal from the northern part of the Ohio No. 8 district if the rates are increased, the record is persuasive that it is not feasible to truck from that district to the Cleveland area . . ."

The substantial evidence in support of this conclusion is that (1) witnesses for the Illuminating Company and the Nickel Plate Railroad admitted they knew of no trucking from mines in the Ohio No. 8

District to the Cleveland area (Tr. 4088, 4702-3) and the only trucking from the Ohio No. 8 District was done on an experimental basis at a loss (Tr. 4222), (2) several witnesses for the protestants testified that the Ohio No. 8 District was beyond practical trucking distance (Tr. 4174, 4182, 4222), and (3) the only actual cost evidence for trucking from the Ohio No. 8 District was 3½ cents per ton-mile in one contract for trucking from the Georgetown Mine. At a distance of 116 miles, this would give a truck cost of $4.06 to Cleveland which compares with a rail rate of $3.07 to Cleveland prior to the 44-cent reduction (Tr. 4178).

5. As to trucking from the Middle and Leetonia Districts, the evidence shows that (1) the coal located there is thin-veined, scattered and in spotty deposits (Tr. 3747), (2) while the Commission has found on page 103 (298 I.C.C. 103) that, from the standpoint of recoverable reserves, the Middle and Leetonia Districts could supply the Illuminating Company with substantial quantities of coal for many years, only 16,292,000 tons of coal are available for strip mining (Exhibit 510, p. 21a, Tr. 4974) and economy in trucking is based on securing strip-mined coal (Tr. 4405-6, 4691, 4481), (3) production by strip-mining in the six counties claimed to be within trucking distance of Cleveland has declined rapidly and the reserves of coal so situated as to be susceptible of strip-mining are being rapidly exhausted (Tr. 4973), (4) the actual trucking costs from the Middle and Leetonia Districts have averaged out at about $2.80 per ton, the same as the rail rate from these districts prior to the 44-cent reduction (Tr. 4421) and the $2.80 truck rate does not reflect all the increases in wages and other

benefits paid the truck drivers in Ohio in recent years (Tr. 4919-20), and (5) from Jensie Mine, an important mine in the Middle District which has always shipped by rail, the distance to the Cleveland outskirts is 100 miles (Tr. 4212) and at 2.9 cents and 3½ cents per ton-mile, two trucking costs submitted by the plaintiffs, the truck rates from the Jensie Mine would be $2.90 and $3.50, respectively, well in excess of the rail rate of $2.80 in effect prior to the intrastate rate reductions.

6. On pages 96 and 97 (298 I.C.C. 96-7), the Commission considers evidence presented by the Illuminating Company to show the costs experienced by that company with truck shipments from Raymilton, Pa. to its Ceico and Eastlake plants. The Illuminating Company's witness testified that in May, 1950, the Illuminating Company started trucking coal from Raymilton, Pa. to Ceico at a "rate" of $2.56 per ton, which the Company was able to reduce to $2.46 per ton about one year later and to $2.36 per ton in October, 1952. The distance was about 82 miles (Tr. 4413-17, 4650, 4654). However, on cross-examination it was developed that each time the "rate" was reduced 10 cents, the mine price of the coal went up 10 cents so that the delivered price of the coal remained the same (Tr. 4649-50), and that no separation was made on the bills between transportation costs and the cost of the coal (Tr. 4666-8). This trucking was performed by the coal company which furnished the coal and a similar arrangement was made with a coal producer for coal trucked to Eastlake from the Butler-Mercer District (Tr. 4655-7). Finally, the Illuminating Company witness testified that large scale trucking by the

Illuminating Company would be an entirely different type of operation (Tr. 4678). After reviewing the evidence as to these private trucking operations in which the cost of the coal and the cost of the transportation were so intermingled as to make them impossible of separation, the Commission reaches the only possible conclusion, namely, that, "In view of this type of operation, the stated truck rates cannot be accepted as a reliable guide as to the cost of transporting coal by truck" (298 I.C.C. 97).

7. There is ample evidence to show that the various trucking cost studies presented by the Illuminating Company were completely unrealistic. None of these studies represented a firm offer by a carrier to transport coal for the Illuminating Company (Tr. 4883). One study was made by a company which manufactures trailers (Tr. 4883), another by a manufacturer of tractors (Tr. 4886), a third by a small mining and trucking company (Tr. 4887), and a fourth was based on I.C.C. cost section calculations for the transportation of iron and steel. The fifth study, which the Commission characterizes as "perhaps the most significant", was based on a completely untested type of highway equipment and is criticized and modified at pages 4908-17 of the transcript of testimony. However, even without these necessary modifications, this study shows a trucking rate of $3.12 for 120 miles. This distance is approximately that from Georgetown in the Ohio No. 8 District to Cleveland and the alleged cost of $3.12 exceeds the rail rate of $3.07 which was in effect prior to the 44-cent reduction (Exhibit 521).

8. The principal alleged saving credited to truck transportation, that of 25 cents per ton covering the cost

of trucking coal to a rail siding, only applies at mines such as that at Raymilton, Pa. which has no rail siding. At mines where coal is dumped from a tipple either into railroad cars or trucks, no such saving would result on the trucked coal (Tr. 4746, 4695-6). At the Warner Collier Company mine in the Middle District, which has an annual production of 500,000 tons, it would cost the same to load by truck as it does by rail (Tr. 4208). Other lesser savings credited to truck transportation do not reflect the cost of installing and maintaining truck-unloading or weighing equipment (Tr. 4887-9).

FILED
JUN 11 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 927

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v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM.

LEE C. HOWLEY
DONALD H. HAUSER
75 Public Square
Cleveland 1, Ohio
NUEL D. BELNAP
HAROLD E. SPENCER
One North LaSalle Street
Chicago 2, Illinois
Counsel for The Cleveland Electric Illuminating Company
BRUCE W. EAKEN
1759 Union Commerce Building
Cleveland 14, Ohio
Counsel for The North American Coal Corporation
C. F. TAPLIN, JR.
1500 Midland Building
Cleveland 15, Ohio
Counsel for Ohio Coal Association

BELNAP & McAULIFFE
JONES, DAY, COCKLEY & REAVIS
McAFEE, GROSSMAN, TAPLIN, HANNING, NEWCOMER & HAZLETT
Of Counsel.

McCORMICK & HENDERSON, INC., CHICAGO, ILL.

TABLE OF CONTENTS.

	PAGE
Argument	1
I.	1
II.	4
III.	5
IV.	7
V.	8
Conclusion	10

CITATIONS

CASES:

Ohio v. United States, 292 U.S. 498	9
Shreveport case (Houston, E. & W. T. R. Co. v. United States, 234 U.S. 342)	4
United States v. Illinois Central, 263 U.S. 515	8, 9

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Appellants reply to appellees' motion to affirm in order to correct certain misapprehensions and misconceptions on the part of appellees as to the nature of the questions presented by this appeal.

ARGUMENT

I.

The important question of statutory construction presented by this appeal—whether the Commission has power to require reductions in interstate rates to cure undue preference and prejudice under section 13(4) of the Interstate Commerce Act (Juris. St., Question No. III, pp. 19-23)—has been misconceived by the appellees.

The Government says that the Commission did not deny its power, but simply held that "the instant case did not present the issue" (Motion, p. 11). That is erroneous. The Commission held that it would not rule on the question of its power to reduce the intrastate rates in the absence of proof that the interstate rates exceed a maximum reasonable level (Juris. St., App. B, at pp. 106-107*). That is the equivalent of denying the power unless the reasonableness of the interstate rates is brought in issue by a complaint filed under section 1 of the Act. This is confirmed by what the Government itself says (Motion p. 12).

> Thus, since the reasonableness of the interstate rates was not presented under the pleadings and proof in the case, the Commission properly refrained from determining that question, and there was no occasion to determine the Commission's powers over interstate rates in a Section 13(3) proceeding.

But the power of the Commission to reduce the interstate rates does not depend upon their being unreasonable for the issue here is no different from what it would be were only two or more interstate rates involved under section 3 of the Act. In such a case it is well established that both rates may lie within the *zone* of reasonableness and yet result in undue prejudice (Juris. St., p. 19). Obviously the same principles are applicable in cases arising under section 13(4) where the only difference is that one of the rates is an intrastate rate. The fact that the higher of the two rates does not exceed a maximum reasonable level does not circumscribe the power of the Commission to re-

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* The Commission's report in Appendix B to the Statement as to Jurisdiction is reproduced photographically and the page numbers correspond to those in volume 298 of the official reports of the Commission.

quire a reduction therein if the Commission concludes that that is the appropriate method for eliminating the undue preference and prejudice.

The railroad appellees mistakenly say that the question is "entirely collateral to the present case" (Motion p. 12). They rest that claim solely on the fact that the Commission's order of investigation was directed to the question of whether the intrastate rates violated section 13(4). But that order, as is true of every order of investigation under section 13(4) directed to particular intrastate rates, no matter how phrased, necessarily raised an issue of lawful rate relations between *two* sets of rates, one intrastate and the other interstate. Every question of undue preference and prejudice, whether under section 3(1) or section 13(4), is always a relationship question involving two or more rates, regardless of the terms in which it is stated. If the relationship between the interstate and intrastate rates was not in issue, then the question of undue preference and prejudice was not in issue. But the Commission decided the latter issue so it is no longer a question of whether the interstate rates were in issue from the standpoint of relationship. Furthermore, the Commission found (Juris. St., App. B, p. 109) that the interstate rates were reasonable so it must follow that those rates were in issue.

Therefore, the only question is as to the *remedy* to be used to remove the preference and prejudice which the Commissioner found to exist. The error of the Commission is in holding that the only means within its power to remove such preference and prejudice was an increase in the intrastate rates.

If the contention of the railroad appellees were sound, then the question of a reduction in interstate rates as an appropriate remedy to cure undue preference and prejudice

under section 13(4) could never be decided. All investigations instituted by the Commission under section 13 of the Act are invariably stated as being into the lawfulness of the intrastate rates. Appellees' position would require that shippers who may be adversely affected as to rates on their intrastate traffic by an investigation under section 13 of the Act would have to file a separate complaint assailing, under section 1 of the Act, the reasonableness of the interstate rates before the Commission would have the power to reduce such rates in establishing a lawful rate relation.

Appellants submit that, under the Act and the *Shreveport* case (Juris. St., p. 21), the Commission has the *power*, once preference and prejudice is shown, to establish lawful rate relations by reducing the interstate rates as well as by increasing the intrastate rates.

It is, therefore, submitted that this is a question of major importance upon which the Court should have the benefit of briefs and oral argument.

II.

On the incorrect assumption that appellants are merely consignees and consumers of coal complaining about the effect on the railroads of diversion of coal from rail to truck, the Government raises a question concerning appellants' right to question the findings of the Commission.

The Illuminating Company purchases coal f.o.b. the mines. It determines whether the coal is to be shipped by truck or by rail. It determines what specific carriers are to be used and over what routes the coal will move. It pays the freight charges. It is directly affected by the order of the Commission requiring an increase in the rates it must pay.

A similar contention was raised by the railroads in the District Court and was rejected by the Court (Juris. St. App. A., pp. 3-5). The contention here, like that in the Court below "rests upon the false premise that the railroads alone have the right to question the validity of the Commission's order as a whole." (Juris. St., App. A., p. 3).

Furthermore neither of the other appellants is either a consignee or consumer of coal. The North American Coal Corporation is a producer of coal from mines in Ohio and the Ohio Coal Association is an association of such producers. The sale of their coal depends upon their access to important consuming markets, which is determined by the level of freight rates. The interest of these producers is that the higher rail freight rates will force the consumers such as the Illuminating Company to buy more coal from nearby mines in the Middle and Leetonia districts and ship such coal by truck, thus adversely affecting the business of these producers.

III.

Neither the Government nor the railroad appellees directly challenge appellants' showing (Juris. St., Question No. I, pp. 12-17) that there are no subsidiary findings in the Commission's report to provide rational support for the Commission's finding (Juris. St., pp. 12-17):

> There is some truck competition from the Middle and Leetonia districts, but it is indicated that it is not of sufficient severity to warrant different treatment of the rates from those districts and the rates from the other districts.

Unless the Commission's subsidiary findings of evidentiary facts indicate some rational basis for such a finding, the Commission's order cannot be sustained since that finding is an essential predicate for the Commission's ultimate conclusion of preference and prejudice.

The Government goes outside of the report to claim that the finding is supported by a single item of evidence, *i.e.*, the evidence which shows that in recent years only 350,000 tons, or about 10 per cent, of the steam coal consumed annually in the Cleveland area moved by railroad from the Middle and Leetonia districts and, therefore, the Government argues, the proper inference is that it would not be feasible for the Illuminating Company to divert (from rail to truck) coal purchases in those districts of a larger quantity (Motion, pp. 9-10)

But the Commission directly rejected any such inference as support for its finding when it said (Juris. St., App. B, p. 103):

> Coal production in the principal counties in the Leetonia and Middle districts rose from 3,649,461 tons in 1945 to 6,503,652 tons in 1953. Considering the indicated recoverable reserves in these districts, it is apparent that they could supply the Illuminating Company with substantial quantities of coal for many years.

The railroad appellees completely misconceived the substance of the point under consideration for they treat it as involving the substantiality of evidence, a question not raised by the appeal, rather than as involving the adequacy of findings, which is the question presented.

In asking the Court to hold that the order is not supported by necessary findings, appellants do not ask the Court to examine the evidence at all or to go back of the Commission's own findings. *The point is simply that the findings do not support the order.* The railroad appellees refer (Motion, p. 8) to the numbered paragraphs on pages 14-17 of appellant's Statement as to Jurisdiction as a "partial summarization of the evidence" relating to truck competition favorable to appellants' contentions. The numbered paragraphs referred to do not summarize the evidence at all, but do *summarize the Commission's own*

findings on the subject of truck competition. In Appendix A to their motion, the railroad appellees attempt to counteract these findings of the Commission by referring to certain evidence before the Commission. The trouble is that they can point to no findings of the Commission to support their contentions. Furthermore, the railroads are actually doing what they erroneously accuse appellants of doing. They are asking this Court to go back of the Commission's own findings and review evidence favorable to them which was never adopted in the findings of the Commission.

The long quotation from the opinion of the lower court (Motion of Railroad Appellees, pp. 7-8) does not in fact rule on the ground of invalidity on which appellants rely. While the lower court notes some of the evidence, its discussion does not treat directly with the adequacy of findings, the point on which appellants rely.

The importance of the question of rationalization and adequate support in the report for the finding which denies the existence of actual and potential intrastate truck competition as a differentiating circumstance, warrants the full consideration of this Court.

IV.

Appellants' Jurisdictional Statement (pp. 18-19) deals adequately with the Government's claim that appellants' Question No. II, which deals with the failure of the Commission to make any finding as to potential truck competition, involves merely a play on words.

The railroad appellees urge that full consideration of potential truck competition is evidenced by the following

finding in the Commission's report (Juris. St., App. B, p. 109):

> On this record, we are not convinced that an increase in the intrastate rates to their former level would cause a diversion of traffic to the trucks to such an extent that the respondents would suffer a greater loss in revenue than would result from maintenance of the present rates.

The foregoing finding was not considered in appellants' Jurisdictional Statement since it purports to be directed to the matter of revenue discrimination, a matter not passed upon by the lower court. If, however, it should be treated as an extension into the future of the finding that existing truck competition is not of sufficient severity to constitute a differentiating circumstance under the issue of preference and prejudice, we need say only that it cannot be rationalized with what the Commission itself says concerning the evidentiary facts (Juris. St., pp. 14-17).

Furthermore, the quoted finding is not supported by but is inconsistent with the Commission's clear finding (Juris. St., App. B, p. 102) that a reduction of 44 cents on 3,423,755 tons of coal would have been offset by a diversion of 538,018 tons to trucks.

V.

Appellants contend that, because of lack of findings, the Commission's decision conflicts with *United States* v. *Illinois Central*, 263 U.S. 515, which held that a "difference in rates cannot be held illegal [because unduly preferential and prejudicial] unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions." (Juris. St., Question No. IV, pp. 23-25). The Government (Motion p. 12) and

the railroad appellees (Motion pp. 16-17) say that this contention is answered by *Ohio* v. *United States*, 292 U.S. 498, in which this Court sustained the 1933 order of the Commission finding undue preference and prejudice as between the Ohio intrastate rates and the interstate rates in effect at that time. In that case, however, as appellants pointed out (Juris. St., pp. 23-24), the Commission met the test of *United States* v. *Illinois Central, supra* by finding that the intrastate rates were "generally substantially lower, distance considered" than the interstate rates and that "this disparity in rates is greater than is warranted by differences in transportation conditions." 292 U.S. at 504. There are no such findings here. That is what distinguishes the two cases.

The five findings referred to by the railroads (Motion, p. 17) are not sufficient to meet the requirements of *United States* v. *Illinois Central*, 263 U.S. 515, *supra*. Numbers (1), (2), and (5) are not pertinent to the issue of preference and prejudice but were made in support of the Commission's ultimate conclusion that the intrastate rates caused unjust revenue discrimination against interstate commerce, a matter not passed upon by the lower court. As has been pointed out, rates may cause preference and prejudice even though they are reasonable. Number (4) is the ultimate finding on preference and prejudice in the language of the statute which requires subsidiary findings to support it. Number (3) is the so-called historical relationship finding which, appellants say, is not of itself sufficient support—lacking compliance with the rule of *United States* v. *Illinois Central, supra*—for a finding of undue preference and prejudice.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal presents substantial questions which should be determined by the Court only after full consideration on the merits and after argument.

Respectfully submitted,

LEE C. HOWLEY
DONALD H. HAUSER
NUEL D. BELNAP
HAROLD E. SPENCER
BRUCE W. EAKEN
C. F. TAPLIN, JR.
Counsel for Appellants.

BELNAP & MCAULIFFE
JONES, DAY, COCKLEY & REAVIS
MCAFEE, GROSSMAN, TAPLIN,
HANNING, NEWCOMER & HAZLETT
Of Counsel